

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

(DIVISION 2)

Gupta v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 60

File number(s): MLG 2536 of 2017

Judgment of: **JUDGE SYMONS**

Date of judgment: 10 February 2022

Catchwords: **MIGRATION** – Application for judicial review of decision of the Administrative Appeals Tribunal – refusal to grant a temporary partner visa – whether the Tribunal failed to give consideration to reg 1.15A(3) matters – whether the Tribunal failed to consider cultural context of parties’ relationship – no jurisdictional error – application dismissed.

Legislation: *Migration Act 1958* (Cth), s.5F
Migration Regulations 1958 (Cth), reg.1.15A, cl.820.211(2)

Cases cited: *AYY17 v Minister for Immigration* (2018) 261 FCR 503;
[2018] FCAFC 89
Campos v Minister for Immigration [2019] FCA 1791
*Gunatillake v Minister for Immigration, Citizenship,
Migrant Services and Multicultural Affairs* [2021] FCA 387
DKN20 v Minister for Immigration [2021] FCAFC 97
He v Minister for Immigration (2017) 255 FCR 41; [2017]
FCAFC 206
SZSSC (2014) 317 ALR 365; [2014] FCA 863
Huynh v Minister for Immigration (2020) 280 FCR 451;
[2020] FCAFC 153

Division: Division 2 General Federal Law

Number of paragraphs: 60

Date of last submission/s: 1 December 2021

Date of hearing: 1 December 2021

Place: Melbourne

Counsel for the Applicant: Mr A Aleksov

Solicitor for the Applicant: Carina Ford Immigration Lawyers

Counsel for the First
Respondent:

Mr G Hill, SC

Solicitor for the
Respondents:

Australian Government Solicitor

ORDERS

MLG 2536 of 2017

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **MAHAK GUPTA**
Applicant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: **JUDGE SYMONS**

DATE OF ORDER: **10 FEBRUARY 2022**

THE COURT ORDERS THAT:

- (i) The name of the first respondent be amended to Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.
- (ii) The applicant's amended application filed 20 October 2021 be dismissed
- (iii) The applicant pay the first respondent's costs of the proceeding fixed in the sum of \$7,853.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE SYMONS

INTRODUCTION

- 1 The applicant lodged an application in this Court on 23 November 2017 seeking judicial review (“Judicial Review Application”) of a 26 October 2017 decision of the Administrative Appeals Tribunal (“Tribunal Decision” and “Tribunal” respectively) pursuant to s 476(1) of the *Migration Act 1958* (Cth) (“the Act”). The Tribunal affirmed a decision of a delegate of the first respondent (“Minister”) to refuse to grant the applicant a temporary partner visa.
- 2 In accordance with orders made by the Court on 13 October 2021, the applicant filed an amended Judicial Review Application on 20 October 2021 (“Amended Judicial Review Application”). The Amended Judicial Review Application abandoned the three grounds identified in the original Judicial Review Application and replaced these with a single ground of review.

BACKGROUND

- 3 The applicant is a citizen of India. She arrived in Australia on 31 August 2015 on a visitor visa and on 30 November 2015 applied for a Partner (Temporary) (Class UK) visa and Partner (Residence) (Class BS) visa (in either case, “the visa”). Her sponsor in that application was Mr Kuppuswamy, who the applicant had married on 26 November 2015 (“the sponsor”). Both the applicant and the sponsor made statutory declarations that were submitted in support of the visa application.
- 4 On 3 March 2016, the sponsor notified the Department that he wished to withdraw his sponsorship of the applicant’s visa application. When invited by the Department to comment on the reason for the breakdown of her marriage the applicant (through her representatives) provided submissions dated 28 March 2016 that identified family violence allegedly carried out by the sponsor as the reason for separation.
- 5 On 30 March 2016, the Department invited the applicant to provide evidence that she was the spouse or de facto partner of the sponsor before their relationship ended in February 2016. On 26 April 2016, the applicant’s representative sent an email to the Department which stated that the applicant was the spouse of the sponsor, and attached a certified copy of the applicant’s marriage certificate.

6 On 2 May 2016, a delegate of the Minister refused the applicant’s visa application. The application was rejected because the delegate found that the evidence and information provided by the applicant was not sufficient to demonstrate that she was the “spouse” or “defacto partner” of the sponsor, as those terms are defined under the Act.

7 On 24 May 2016, the applicant applied to the Tribunal for review of the delegate’s decision.

8 On 6 March 2017, the Tribunal invited the applicant to provide further information to support her claims that she and the sponsor were in a spouse or de facto relationship. The applicant provided a responsive submission (prepared by her representative) that under the heading “Genuine Relationship” included paragraphs [16] to [18] which, because of their significance to the arguments raised in this application, are reproduced in their entirety. They state:

[16] The Applicant and her estranged spouse had a relatively short courtship, marrying a few months after they met via a dating website. In assessing the genuineness of the relationship prior to its breakdown, we submit that due regard should be had to the Applicant’s personal circumstances and attributes such as her Indian culture and cultural norms and the context of her relationship.

[17] In *Cahyana v Minister for Immigration & Multicultural Affairs* [1998] 390 FCA, the Court cited *Lynam v Director General of Social Security* (1984) 52 ALR 128 with approval. *Lynam* discussed the test for a genuine marriage. On this point, Fitzgerald J held that:

...it is...important that departmental officers or tribunal charged with the task at least take into account what is the norm for the peer group of the applicant. Only in this way can the legislation be fair and justly accommodated in a multi-racial and otherwise diverse society’. (bold in original)

[18] It is submitted that the applicant in the instant case meets the relevant criteria regarding her then genuine and continuing spousal relationship with her sponsor. Prior to their separation, and after her subclass 820 partner visa was lodged, the Applicant and her estranged spouse were in a genuine and continuing spousal relationship. That their relationship may have been in its infancy or even dysfunctional at times does not detract from the fact that they were in a genuine and continuing relationship, as the Applicant may have considered that her relationship fits within the cultural norms of a traditional, conservative Indian relationship (see *Lynam* and *Cahyana*, *supra*). At the time of lodging the application and for some time afterwards, the Applicant and her then sponsor had a commitment to share their love together to the exclusion of all others. That this commitment may have been short-lived does not prevent her from satisfying the relevant criteria. The Applicant’s cultural background may have previously overridden her apprehension about her estranged spouse’s unpredictable attitude towards her at times.

9 On 17 May 2017, the applicant’s representative provided the Tribunal with a statement of the applicant outlining the history of her relationship with the sponsor.

10 On 19 May 2017, the Tribunal conducted a hearing at which the applicant gave evidence and presented arguments assisted by an interpreter in the Hindi language and her representative. The Tribunal also took evidence from the applicant’s sister, Ms Bhawna.

TRIBUNAL DECISION

11 On 26 October 2017, the Tribunal affirmed the decision under review. To the extent that it bears on this judicial review application, the Tribunal decision was organised as follows.

12 The Tribunal at [9] (CB 312) referred to the definition of “spouse” in s 5F of the Act and noted that in forming an opinion as to the matters identified in the definition, regard must be had to all of the circumstances of the relationship including the matters identified in reg 1.15A(3) of the *Migration Regulations 1958* (Cth) (“the Regulations”).

13 The Tribunal found that the parties had married on 26 November 2015 and as such, were married to each other under a marriage that was valid for the purpose of the Act as required by s 5F(2)(a) ([12] CB 313).

14 The Tribunal considered whether the “other requirements for a spousal relationship” were met.

15 The Tribunal first considered the “financial aspects” ([13]-[38] CB 313-316). The Tribunal between [16] – [28] (CB 313-315) identified evidence bearing on the issue.

16 The Tribunal referred to the statutory declarations sworn by the applicant and the sponsor on 27 November 2015 and noted that whilst the parties might not have been in a position to combine their finances at that exact point, the declarations spoke of future intentions. The Tribunal found that there was “little or negligible evidence” that these future intentions were acted upon ([30] CB 315).

17 The Tribunal referred to the withdrawal of sponsorship by the sponsor and accepted that there was only some three months of the parties being in a legally married situation before the purported breakdown of the marriage. The Tribunal observed that there was still little indication that the financial intentions of the parties were carried out and the possibility that access to records was prevented by a family violence situation did not fully explain this absence, neither did the not unusual circumstance that victims of family violence experienced financial control from a partner ([35]-[36] CB 315-316).

- 18 The Tribunal gave “lesser weight” to the financial aspect ([38] CB 316). None of its reasons directed at this consideration made reference (at least explicitly) to the “cultural context” of the parties’ relationship.
- 19 The Tribunal next considered the “nature of the household” ([38]-[45] CB 316-317). In this context, the Tribunal referred to evidence directed at the parties’ domestic arrangements, including evidence from the applicant that she had shared a room with the sponsor, her account of the housework done in the home and gardening performed by the sponsor, the “waking” and “commuting” habits of the parties, and the fact that the parties had a lease in joint names.
- 20 The Tribunal found that there was evidence that the applicant had resided in the home with the sponsor and performed certain household tasks and gave the factor “some limited weight” ([45] CB 317). The Tribunal did not make express reference in this section to the “cultural context” of the parties relationship save to the extent that it reproduced a statement from the applicant that referred to the parties having married “according to our culture” in October 2015 ([42] CB 316).
- 21 The Tribunal next considered the “social aspects” of the parties’ relationship ([46]-[58] CB 317-318). In this context, the Tribunal referred to statutory declarations from Ms Bhawna and Mr Singh (the applicant’s brother-in-law) and characterised their descriptions of social events as “general and generic” and providing “only limited insight” ([49]-[50] CB 317).
- 22 The Tribunal referred to some 16 photographs that were before it but noted that they depicted the parties together but no other person. The Tribunal regarded the photos as evidence that the parties knew one another but not as evidence of social recognition ([54] CB 318).
- 23 The Tribunal accepted that some joint social activities might have been undertaken by the parties during the currency of their relationship, but gave “lesser weight” to the social aspect for the reasons it had identified ([58] CB 318). None of the Tribunal’s reasons directed at the social aspects made express reference to the “cultural context” of the parties’ relationship.
- 24 The Tribunal next considered the “nature of persons’ commitment to each other” ([59]-[72] CB 318-321). In this context, the Tribunal:
- (a) gave regard to evidence that, during their period of cohabitation, the parties took care of one another’s needs including cooking and paying essential household expenses ([60] CB 318);

- (b) noted that there was written evidence of constant communication before the Tribunal of a “close and intimate nature” ([61] CB 318);
- (c) referred to an exchange between the Tribunal and the applicant during the hearing concerning the parties’ first face-to-face meeting ([62] CB 319-320) and noted that the exchange contrasted with the applicant’s written statement to the Tribunal sent on 17 May 2017 in terms of its identification of where the parties had met for the first time ([63]-[64] CB 320);
- (d) referred to and characterised the applicant’s accounts of the second meeting with the sponsor as “also confused”. The Tribunal found the “lack of accurate or consistent recollection of a momentous life event” to be of concern ([67] CB 320-321).

25 The Tribunal at [70] (CB 321) made reference to the “cultural context” of the parties’ relationship. The Tribunal said:

[70] The applicant’s representative’s written submission of 28 March 2017 also discusses the proposition that genuine and mutual commitment and the parties’ relatively short courtship and marrying a few months after meeting on a dating website are in harmony with one another. The applicant’s written submission states that assessing the genuineness of the relationship needs to be done within the context of the applicant’s personal circumstances and attributes such as the Indian culture and cultural norms in the context of her relationship. I accept that traditional, conservative Indian relationship norms might well involve quicker inception, proposal, and traditional and legal marriage ceremonies. As such, the aspects surrounding parties’ relatively short courtship, marrying a few months after meeting on a dating website do not form part of my concerns in this matter.

26 The Tribunal found, despite this acknowledgement, that the “minimal corroborating evidence, along with inconsistent recollection about the inception and early days of the relationship” was problematic and that it was not apparent that both parties saw the relationship as a long-term and exclusive one, or that they had planned a future together as spouses, or that there was companionship and emotional support ([71]-[72] CB 321).

27 The Tribunal found that the parties were married under a valid marriage (satisfying s 5F(2)(a) of the Act) but was not satisfied that the applicant and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others (as required by s 5F(2)(b)) or that the relationship between them was genuine and continuing (as required by s 5F(2)(c)). The Tribunal was also not satisfied that the applicant and the sponsor lived together as spouse or did not live separately and apart on a permanent basis (as required by s 5F(2)(d)). The

Tribunal was not satisfied that the parties were in a spousal relationship with the result that the applicant did not meet cl 820.211(2) of the Regulations ([103]-[108] CB 327).

28 Since the Tribunal concluded that the parties were never in a genuine spousal relationship, the question of whether the applicant had suffered family violence committed by the sponsor did not arise for consideration ([109] CB 327).

GROUND OF APPLICATION

29 The applicant identifies the following alleged jurisdictional error in his Amended Judicial Review Application:

The Tribunal failed to consider an important submission, being the need to take account of cultural norms.

Applicant's submissions

30 In her written submissions filed on 20 October 2021, the applicant describes her case as based on the decision in *He v Minister for Immigration* (2017) 255 FCR 41 (“*He*”) at [73]-[77] and the proposition that a decision-maker (such as the Tribunal) is required to make findings upon and consider each of the prescribed matters in reg 1.15A of the Regulations.

31 The applicant submits that in her case, this principle required the Tribunal to keep “front of mind” when assessing the evidence in relation to *all of the matters* in reg 1.15A the submission (reproduced at [8] above) that “due regard should be had to the applicant’s personal circumstances and attributes such as her Indian culture and cultural norms and the context of her relationship” (“the cultural context submission”). The applicant complains that this did not occur. The applicant submits that this inference is available because there is “simply no recognition of the important submission” (citing *SZSSC* (2014) 317 ALR 365 at [81]).

32 The applicant – addressing the element of materiality – submits that had the cultural context submission been taken into account the following findings of the Tribunal might well have been different.

33 First – the finding at [36] (CB 315) which refers to a lack of financial records and documents and evidence that the sponsor refused to pay the applicant’s expenses. The applicant submits that had the Tribunal taken into account that the husband and wife’s norms and expectations were influenced by attitudes towards marriage in India, the lack of “financial intermingling” might have been explained or mitigated and consequently attributed less (adverse) weight.

- 34 Second – the finding at [45] (CB 317) that limited weight be placed on evidence that the applicant resided in the home with the sponsor and performed certain household tasks. The applicant submits that had the cultural context submission been considered, it might well have meant substantially more weight would have been placed on the finding.
- 35 Third – the findings at [56]-[58] (CB 318) which recorded observations about the lack of photographic evidence of the parties with others and little corroborative evidence from third parties about the parties’ relationship. The applicant submits that the Tribunal was looking for evidence of established social recognition of their marriage when that was unrealistic for a marriage according to traditions practiced in India. Instead, understood in its cultural context, the applicant and the sponsor would only have been *developing* a social presence as spouses, rather than having *established* any such social presence.
- 36 In oral submissions to the Court, counsel for the applicant, Mr Aleksov, submitted that the reference in the cultural context submission to the genuine relationship should have been understood (including by the Tribunal) as a reference to each of the sub-paragraphs of the definition of “spouse” contained in s 5F(2) of the Act, rather than as a reference to a discrete factor of factors identified in reg 1.15A of the Regulations.
- 37 Mr Aleksov characterised the cultural context submission as important and generalised in its application. The submission was made that the Tribunal was required to assess all aspects of the applicant’s evidence and the reg 1.15A factors “through the prism” of the parties’ peculiar cultural context.
- 38 The failure to consider was especially acute in relation to the financial and social aspects of the parties’ relationship. The applicant submitted that when assessed in its particular cultural context, even a small amount of evidence bearing on these aspects was capable of being probative.
- 39 The applicant submitted that the Tribunal had chosen to deal with the various reg 1.15A factors in a compartmentalised fashion. It was not open therefore to find that the conclusions that the Tribunal had reached when it had addressed the topic of the genuineness of the parties’ relationship had carried through to its assessment of the other specific matters raised by reg 1.15A.

Minister's submissions

- 40 The Minister submits that the obligation in reg 1.15A(2) to “consider” certain matters means that the decision-maker (here, the Tribunal) must give active intellectual consideration to those matters (referring to *He* at [73]). The Minister accepts that in some circumstances, a failure to consider a representation made by an applicant may amount to a failure to consider all the circumstances of the relationship, as required by reg 1.15A(2). However, a decision-maker is not required to refer expressly to every piece of evidence advanced by an applicant (referring to *He* at [83]) and a finding may be implicit, rather than express, in the Tribunal’s reasons (citing *He* at [85]).
- 41 The Minister submits that the Tribunal did expressly consider (at [70] CB 321) the representation that it was necessary to take account of cultural norms relating to marriage in India in assessing the genuineness of the applicant’s relationship. The Tribunal accepted that traditional, conservative Indian relationship norms might involve quicker inception, proposal, and traditional and legal marriage ceremonies. The Tribunal for this reason was not concerned by the parties’ relatively short courtship. Instead, the Tribunal was concerned by the minimal corroborating evidence, and inconsistent recollection about the inception and early days of the relationship.
- 42 To the extent that the Tribunal referred expressly to cultural norms only when assessing the nature of the persons’ commitment to each other, this did not reveal error. This was for two reasons. First, the Tribunal had considered the submission actually made, namely, that cultural norms were relevant to the genuineness of the applicant’s relationship. The Minister emphasised that the way in which a claim is articulated assumes special significance when a person has professional representation, as was the case here (referring, by way of analogy, to *AYY17 v Minister for Immigration* (2018) 261 FCR 503 at [18]).
- 43 Second, although the Tribunal referred to cultural norms specifically when addressing genuineness, the conclusions it reached on that topic would carry through to its assessment of the other specific matters raised by reg 1.15A. This was because the genuineness of the relationship is the overall matter raised by s 5F and reg 1.15A, given that the evident purpose of these provisions is to exclude sham or contrived marriages that are being used to obtain the grant of visas. Further (and relatedly), where it is obvious that the nature and expression of findings on one matter will extend to other topics requiring consideration, a finding on the second or subsidiary matter may properly be inferred (referring to *Campos v Minister for*

Immigration [2019] FCA 1791 (“*Campos*”) at [36] and *DKN20 v Minister for Immigration* [2021] FCAFC 97 at [40]-[43]).

44 The Minister also made the submission that the reference at [71] (CB 321) of the Tribunal’s reasons to “earlier-mentioned factors” that included “minimal corroborating evidence” was plainly picking up the Tribunal’s reasoning at [55]-[57] (CB 318) which was directed at the “social aspects” of the parties’ relationship.

45 In oral submissions to the Court, Mr Hill SC, who represented the Minister, emphasised, including by reference to the decisions of *Huynh v Minister for Immigration* (2020) 280 FCR 451 and *Campos*, that sub-paragraphs (b) and (c) of s 5F(2) are highly evaluative and impressionistic criteria and that this was a matter that needed to be borne in mind when construing the Tribunal’s reasons. The nature of the assessment had certain implications, including that where a representation went to two or more factors, it did not have to be repeated formulaically. Likewise, it might be inferred that that where a matter was dealt with in one aspect, the Tribunal had considered it with respect to all (relevant) factors.

46 The Minister submitted that in the present case, the reason why the Tribunal had dealt in detail with the cultural context submission under the heading “nature of persons’ commitment to each other” was that this was the natural spot to address such a submission that was directed at the genuineness of the relationship. On the Minister’s case, it was clear from the Tribunal’s reasons, read as a whole, that the Tribunal had considered the cultural context submission to the extent that it was relevant to the two factors where the Tribunal had found against the applicant (“social aspect” and “nature of commitment”). In respect of the other two factors (“financial aspect” and “nature of household”), either the Tribunal did not find against the applicant or made a finding slightly in favour of the applicant. Regarding the last two factors, it was submitted that the cultural context submission did not directly engage with the Tribunal’s analysis. In relation to “financial aspect”, this had involved a comparison of what the parties did compared with what they said they would do and, in relation to “nature of household” involved an evaluation of the evidence bearing on the issue, with no assumption that the household had to be of a particular type.

47 The character of the Tribunal’s findings meant, on the question of materiality, that even if the Tribunal had failed to consider the cultural context submission in some relevant aspect (a matter not conceded by the Minister), any failure was not material because either the Tribunal

had found in favour of the applicant or had not relied on any matter relevant to the cultural context submission against the applicant.

CONSIDERATION

48 The central criterion for both a Temporary Partner visa and Residence Partner visa is that the visa applicant must be the “spouse” of the sponsor.

49 Section 5F of the Act defines the word “spouse” as follows:

5F Spouse

- 1) For the purposes of this Act, a person is the *spouse* of another person if, under subsection (2), the 2 persons are in a married relationship.
- 2) For the purposes of subsection (1), persons are in a *married relationship* if:
 - a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
 - c) the relationship between them is genuine and continuing; and
 - d) they:
 - i) live together; or
 - ii) do not live separately and apart on a permanent basis.
- 3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

50 Regulation 1.15A of the Regulations provides, relevantly:

1.15A Spouse

- (1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.
- (2) ...
the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - i) any joint ownership of real estate or other major assets; and
 - ii) any joint liabilities; and
 - iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - i) any joint responsibility for the care and support of

- children; and
- ii) the living arrangements of the persons; and
- iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - i) whether the persons represent themselves to other people as being married to each other; and
 - ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - i) the duration of the relationship; and
 - ii) the length of time during which the persons have lived together; and
 - iii) the degree of companionship and emotional support that the persons draw from each other; and
 - iv) whether the persons see the relationship as a long-term one.

51 In *He*, a decision upon which the applicant relies, a Full Court of the Federal Court (Siopis, Kerr and Rangiah JJ) confronted the question of whether reg 1.15A(2) required the Tribunal to make findings upon each of the circumstances set out in reg 1.15A(3). The Full Court confirmed that each of the matters identified in reg 1.15A(3) are relevant considerations which the decision-maker is bound to consider, in the sense that it “must at least apply an active intellectual process and give proper, genuine and realistic consideration” to each of them (*He* at [50], [52], [59], [73], [76]-[77]).

52 The Full Court also observed that beyond the matters prescribed by reg 1.15A(3), the evidence and other material before the Tribunal may also reveal other relevant circumstances which instead fall to be considered under reg 1.15A(2) (*He* at [59]).

53 I did not understand the applicant to contend that the Tribunal had failed to make findings upon each of the circumstances set out in reg 1.15A(3) but rather that, in respect of three of the four principal matters prescribed under that provision (being the financial aspects, the nature of the household and the social aspects) the quality and extent of the consideration fell short in circumstances where the Tribunal had failed to assess the evidence and material before it relating to these matters through the prism of the cultural norms of a traditional, conservative (arranged) Indian relationship.

54 I accept as a matter of general principle, that the Tribunal was required to have regard to information and matters capable of bearing upon the question of whether the applicant and the sponsor were, at relevant times, in a married relationship, whether that information or

matters were identified prescriptively through reg 1.15A(3) or emerged, as in this case, from a submission made to the Tribunal by the applicant's representative.

55 However, as Justice Murphy observed in *Gunatillake v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 387 at [73] (a case decided in the same statutory context as this one), the extent of the active intellectual process depends on the nature and relevance of this information. It is necessary therefore to say something about the matters identified, and the claims made, in the cultural context submission (reproduced at [8] above).

56 I accept, having regard to the place of the cultural context submission in a more comprehensive submission that referred to and reproduced the statutory definition of “spouse” and the reg 1.15A(3) “indicia”, that it was not limited in its potential application to any one or more of the matters prescribed by reg 1.15A(3). However, it is also the case that aside from exhorting the Tribunal to have regard to the applicant’s “essential circumstances” which were described as including the applicant’s “Indian culture and cultural norms”, the submission said nothing whatsoever to give meaning or context to the culture and/or its norms, or how they might manifest and/or operate on a relationship that came about as a result of a dating website rather than, as the applicant would appear to suggest in her written submissions to this Court, as the product of an arranged marriage.¹

57 The only characteristic identified in the submission was that the relationship involved a “relatively short courtship” and that the commitment between the applicant and the sponsor was ultimately “short-lived”. The submission did not explain how either of these characteristics, or the Indian culture or cultural norms, might impact on the matters that the Tribunal was statutorily required to consider.

58 In these circumstances, I reject the argument that the Tribunal’s analysis miscarried through a failure to more comprehensively engage with the cultural context submission. The Tribunal plainly was aware of the submission and dealt with it explicitly when it considered the matters identified by sub-reg 1.15A(3)(d). This was the logical point of intersection, as the matters further enumerated by this sub-paragraph include; (i) the duration of the relationship; (ii) the length of time during which the persons have lived together; and (iii) whether the persons see the relationship as a long term one.

¹ Applicant’s written submissions filed 20 October 2021 at [3].

59 I do not accept the Minister’s submission that the reference at [71] (CB 321) of the Tribunal’s reasons should be construed as referring back to [55]-[57] (CB 318) in circumstances where the paragraph operates on “the area of commitment” and the Tribunal had (within the same section of its reasons at [68] CB 321) identified deficiencies in the third party information concerning the relationship. However despite this, I consider that the Tribunal’s consideration of the other sub-reg 1.15A(3) factors reflected an awareness of, and engagement with, the cultural context submission, to the extent that it was relevant. This follows from:

- (a) The Tribunal acknowledging at [36] (CB 315) and in its consideration of “financial aspects” that the parties had been in a legally married situation before its purported breakdown for a period of “only some three months”;
- (b) The Tribunal referring, in the context of its consideration of the “nature of the household” to a statement from the applicant that explained a decision to sign a lease agreement by reference to the applicant’s culture ([42] CB 316); and
- (c) The Tribunal acknowledging, in the context of its consideration of the “social aspects” that the relationship only lasted a number of months ([56] CB 318).

DISMISSAL

60 In these circumstances, the applicant’s amended application filed 20 October 2021 will be dismissed with costs fixed in the sum of \$7,853.

61

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Symons.

Associate:

Dated: 10 February 2022